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IN THE

Supreme Court of the United States

October Term, 1959

No. 840

EDNA M. FAUCI, *Petitioner*,

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT AND EDWIN F. HANNON, JR., RECEIVER, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, by her counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on February 24, 1960 (App., *infra*, p. 16, R. 79), affirming the oral order and judgment of the United States District Court for the District of Massachusetts entered on September 24, 1959, denying Edna Fauci's petition for an injunction and order restraining the respondents from selling her real property in payment of a money judgment entered against her on April 23, 1958 and tendering in money the amount of the judgment, plus interest as required by law (App., *infra*, p. 17, R. 9).

Opinions Below

The order of the District Court is not reported but may be found in the Appendix, *infra*, p. 17, (R. 9). There was no written opinion, order or judgment by the District Court.

The opinion of the Court of Appeals, promulgated February 24, 1960, affirming the order and judgment of the District Court, is not reported but may be found in the Appendix, *infra*, p. 10, (R. 73).

Jurisdiction

The judgment of the Court of Appeals was made and entered on February 24, 1960 (App., *infra*, p. 16, R. 79). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Questions Presented

I.

Whether the sale of petitioner's real property to pay judgments against other parties for delinquent Federal income taxes is unlawful under Federal Tax Law.

II.

Whether the decision and judgment of the Court of Appeals affirming the District Court in refusing the tender by petitioner of full payment of a judgment against her and directing that petitioner's real property be sold in payment of judgments against others, deprives petitioner of her property without due process of law under the Fifth Amendment to the Constitution of the United States.

Statutes and Constitutional Provisions Involved

Statutes

Internal Revenue Code of 1939:

Section 3653 (App. *infra*, p. 22).

Internal Revenue Code of 1954:

Section 7421 (App. *infra*, p. 22).

Constitutional Provisions

Amendment V to The Constitution of the United States of America (App., *infra*, p. 23).

Statement of the Case

During the year 1955 an action in the nature of a bill to reach and apply was brought in the United States District Court for the District of Massachusetts by the United States against Charles M. Fauci Co., Inc. and Charles M. Fauci, taxpayers, and other defendants including Edna Fauci, the petitioner (App. *infra*, p. 11, R. 73). A judgment was entered by the District Court on April 23, 1958 against the taxpayers Charles M. Fauci Co., Inc. and Charles M. Fauci, as transferee, in the amount of $156,686.68 (App., *infra*, p. 19, R. 2).

The judgment also provided that (R. 3) (App., *infra*, p. 20)

> (7) That plaintiff have judgment against Edna M. Fauci in the amount of $3,185.54 with interest at 6 per cent from May 11, 1953.
>
> (8) That plaintiff have judgment against Atlas Liquor Company in the amount of $55,000.00, (the value of the assets of the C. M. Fauci Co. transferred to the Mystic Liquor Co. (subsequently known as Atlas Liquor Co.) on 12/28/48) with interest at 6 per cent from February 24, 1949.
>
> (9) That plaintiff have judgment against Virginia Himmel in the amount of $54,000, (the value of all of the outstanding stock of the Atlas Liquor Co. on February 17, 1950), with interest at 6 per cent from February 17, 1950.
>
> (10) That plaintiff have judgment against Irving Himmel in the amount of $7,547.24 with interest at 6 per cent from September 30, 1956.

(11) That costs in the amount of $——— be taxed against defendants, C. M. Fauci Co., Inc., Charles M. Fauci, Frances Denehy, Edna Fauci, Atlas Liquor Co., Irving Himmel, and Virginia Himmel.

(12) That the total amount to be recovered by the United States in this action from all property involved and from all defendants shall not exceed $156,686.68 plus interest and costs as provided by law.

The judgment further provided (R. 2): (App. *infra*, p. 19)

(5) That the claim and lien of the United States with respect to the property located at 127 Mystic Avenue, Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston, has priority over the claims of all parties to this action.

The respondents advertised for sale at public auction on September 26, 1959 the petitioner's property located at 139-141 Mystic Avenue, Medford, Massachusetts, in order to collect the aforesaid judgments (R. 4).

On the 22d day of September, 1959, petitioner filed in the District Court a petition for injunction praying that the District Court enter an order restraining and enjoining the United States of America, the District Director of Internal Aevenue, Boston, Massachusetts District, and Edwin F. Hannon, Jr., Receiver, and/or their duly authorized subordinates, employees or representatives, from selling on September 26, 1959, or disposing of petitioner's real property at 139-141 Mystic Avenue, Medford, Massachusetts, and grant to petitioner such other and further relief as to the Honorable Court might seem meet and just in the circumstances. The petition for injunction set forth in part as follows (R. 4-5):

"2. That your petitioner has title and is the owner of real property located at 139-141 Mystic Avenue, Medford, Massachusetts.

"3. That on the 23rd day of March, 1958[1] this Hon-

[1] Typographical error; should be April, 1958.

orable Court entered a judgment against your petitioner in favor of the United States of America in the amount of $3,185.54, with interest at 6% from May 11, 1953 and that said judgment was entered in the cause of United States of America, Plaintiff v. C. M. Fauci Co., Inc. et al., Defendants, Civil Action No. 55-556-S in the United States District Court for the District of Massachusetts.

"4. That the amount of said judgment, including the interest thereon from May 11, 1953 at 6 per cent, is not in excess of $4,411.97, computing the aforesaid interest at the rate of 6 per cent to October 11, 1959.

"5. That the said real property of your petitioner at 139-141 Mystic Avenue, Medford, Massachusetts, is a most valuable tract of real estate, having a market value far in excess of the total amount of the aforesaid judgment, to wit: $4,411.97.

"6. That your petitioner will suffer undue hardship and irreparable damage if said real property is sold at public auction at a forced sale value in view of the fact that the substantial value of this property is far in excess of the small amount of the aforesaid judgment."

The injunction petition further alleged that there were no outstanding judgments against petitioner with the exception of the one judgment for $3,185.54 which, including interest, amounted to $4,411.97 and stated:

"8. That your petititoner, in further support of this petition, offers to pay and will tender at the time that this petition is set down by this Honorable Court for hearing the full amount of the aforesaid judgment against your petitioner, as computed hereinabove; in the sum of $4,411.97."

The petition for injunction was set down for hearing by the District Court on September 24, 1959 (R. 6). At the hearing counsel for petitioner tendered $4,411.97, the amount of the judgment against petitioner, plus interest thereon at 6 per cent from May 11, 1953, in full payment of the amount due under the aforesaid judgment (R. 7).

The District Court denied the tender of the money in payment of the judgment, denied the petition for the injunction and directed that petitioner's real property be sold (R. 9) (App., *infra*, p. 17)

The petitioner herein appealed to the United States Court of Appeals for the First Circuit (R. 10). On February 24, 1960, the Court of Appeals entered an opinion (R. 73) and judgment (R. 79) affirming the judgment and order of the District Court (App., *infra*, Opinion p. 10 Judgment p. 16).

The petitioner now prays that a writ of certiorari be issued by this Honorable Court to review the aforesaid judgment of the United States Court of Appeals for the First Circuit.

Reasons for Granting the Writ

I

This case involves substantial questions of Federal tax law and Constitutional law.

It is respectfully submitted that the property of one taxpayer cannot lawfully be sold to collect delinquent taxes due from others. The Federal statute (Section 3653 of the 1939 Internal Revenue Code and Section 7421 of the 1954 Internal Revenue Code) prohibiting suits to restrain the collection if Federal taxes is directed at the person or entity liable for the taxes and is not intended to preclude the courts from giving protection to one not liable for the taxes whose property is in danger of seizure and sale by the taxing authorities. *Shelton* v. Gill (CA 4, 1953), 202 F. 2d 503; *Holland* v. *Nix* (CA 5, 1954), 214 F. 2d 317, 320; *Pool* v. *Walsh* (CA 9, 1922), 282 F. 620; *Adler et al.* v. *Nichols et al.* (CA 10, 1948) 166 F. 2d 674; *Long* v. *Rasmussen* (D.C. Mont., 1922), 281 F. 236; *National Iron Bank et al.* v. *Manning* (D.C. N. J. 1948), 76

F. Supp. 841; *Bechtol* v. *Larson* (D.C. Fla.) 26 A.F.T.R. 1093, 1199.

As stated by the United States Court of Appeals for the Fourth Circuit in *Shelton* v. *Gill, supra*:

• • • •

> "It may be noted, at the outset, that the broad prohibition of Sec. 3653(a) against the maintenance of any suit to restrain the collection of any taxes is directed at the person liable for the taxes and is not intended to preclude the courts from affording protection to one not liable to the taxes whose property may be in danger of seizure and sale by the taxing authorities. See Tower Production Co. v. Jones, D.C. Okl., 45 F. Supp 593; Id., 10 Cir., 138 F. 2d 675; Tower Production Co. v. U.S., 61 F. Supp. 411; Id., 3 Cir., 153 F. 2d 304; National Iron Bank v. Manning, D.C., 76 F. Supp. 841; Adler v. Nicholas, 10 Cir., 166 F. 2d 674; Hubbard Investment Co. v. Brast, 4 Cir., 59 F. 2d 709."

• • • •

The facts in this case bring it squarely within the foregoing decisions of the Courts of Appeal and the District Courts of the United States. Here there was a judgment for taxes against the petitioner, Edna M. Fauci. She tendered to the District Court full payment of the amount of the judgment against her and prayed for an injunction restraining the respondents from selling her real property to collect the judgments which had been obtained against others for delinquent Federal income taxes. The District Court refused the tender of the money in full payment of the judgment against petitioner; denied the petition for injunction and directed the sale of petitioner's real property for the collection of the judgments against other parties who were co-defendants in the action brought by respondents for the collection of unpaid Federal income taxes. The proposed sale of the property was for a sum greatly in excess of the judgment obtained against petitioner, which was only in the amount of $4,-

411.97, including interest. The Court of Appeals affirmed the judgment of the District Court.[1]

We think and respectfully urge that the decision of the court below is in conflict with the decisions of the Fourth and Fifth Circuits in *Shelton* v. *Gill, supra*, and *Holland* v. *Nix, supra*.

II.

We think that the unusual and particularly equitable factors which are present in this case bring it within the "exceptional circumstances" referred to by this Court in *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422.

In *National Foundry Co. of New York* v. *Director of Internal Revenue*, 229 F. 2d 149, 48 AFTR 853 (CA 2, 1956) the Court of Appeals concisely stated the rule applicable here as follows:

• • • • •

> "The main basis for the decision below and for the appellee's argument for a differentiation of the claims he presses from those of the City and State of New York is the well known statute, now I.R.C. Sec. 7421, 26 U.S.C., which provides—within certain exceptions not here applicable for pending or potential Tax Court matters—that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' But it has long been settled that this general prohibition is subject to exception in the case of an individual taxpayer against a particular collector where the tax is clearly illegal or other special circumstances of an unusual character make an appeal to equitable remedies appropriate. See, for example, Miller v. Standard Nut

[1] In its opinion the Court of Appeals indicated that the Fauci appeal might be moot since the record showed that the property was actually sold on October 17, 1959. The Court noted that the appellee had not raised the issue. Counsel is advised that the purchaser refused to go through with the purchase pending final action on the Fauci appeal.

Margarine Co. of Florida, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422; Shelton v. Gill, 4 Cir., 202 F. 2d 503; Holland v. Nix, 5 Cir., 214 F. 2d 317, 320."

• • • •

The same line of reasoning was adopted by the Fourth and Fifth Circuits in *Shelton* v. *Gill, supra* and *Holland* v. *Nix, supra.*

III

It is further submitted that the proposed sale of the petitioner's real property to collect the delinquent taxes of others has the effect of depriving the petitioner of her property *without due process of law.*

The District Court refused to accept from petitioner the tender of money to pay the judgment outstanding against her. The Court then denied the petition for injunction. We respectfully urge that the sale of one person's property to pay the taxes of others violates the Fifth Amendment to the Constitution of the United States. This is particularly true when we consider that the proposed sale of petitioner's property (after her tender of payment was refused) was not for the purpose of collecting a judgment against the petitioner herself.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5594

EDNA M. FAUCI, DEFENDANT, APPELLANT

v.

EDWIN F. HANNON, JR., RECEIVER, ET AL., APPELLEES

No. 5595

FRANCES C. DENEHY, DEFENDANT, APPELLANT

v.

SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Vincent Mottola for Edna M. Fauci, appellant.

Joseph A. Todisco, with whom *Nello E. Barrasso* and *William H. Lewis, Jr.*, were on brief, for Frances C. Denehy, appellant.

Thomas E. Goode and *George C. Caner, Jr.*, Assistant U. S. Attorney, with whom *Elliot L. Richardson*, United

States Attorney, was on brief, for Edwin F. Hannon, Jr., Receiver, and United States of America, appellees.

OPINION OF THE COURT

February 24, 1960

ALDRICH, *Circuit Judge.* In 1955 an action in the nature of a bill to reach and apply was brought in the district court for the District of Massachusetts by the United States against Charles M. Fauci Co., Inc., and Charles M. Fauci, hereinafter called taxpayers, and a number of other defendants, including the present appellants Edna M. Fauci, hereinafter called Fauci, and Frances C. Denehy. The complaint alleged that deficiencies had been assessed against the taxpayers, creating tax liens in favor of the United States on taxpayers' property and rights to property; that the taxpayers were insolvent during the taxable years in question and subsequently; that appellants and other defendants had received certain property from taxpayers without giving adequate consideration therefor; that the taxpayers were entitled to the return of such property; and "that by virtue of its liens upon all property or rights to property of [taxpayers] . . . the United States is entitled to such property, or its proceeds, in the hands of the [appellants and] other defendants . . . [and] is further entitled to the benefits of all other rights and claims . . . [taxpayers] may have against such . . . defendants . . . ." Among the property described in the complaint was real estate located at 139-141 Mystic Avenue, Medford, Massachusetts, hereinafter called the locus. On April 23, 1958, following a jury verdict, the district court entered a judgment which provided that the government should recover $156,686.68 from the taxpayers, and that Edwin F. Hannon, Jr., appellee herein, be appointed as receiver to sell certain real property, including the locus, and deposit

the proceeds in court. Paragraph 5 of the judgment provided, "That the claim and lien of the United States with respect to the property located at . . . 139-141 Mystic Avenue, Medford, . . . has priority over the claims of all parties to this action." Paragraph 7 provided, "That plaintiff have judgment against Edna M. Fauci in the amount of $3,185.54 with interest . . . ." No money judgment was rendered against Denehy. It was further provided that the total amount to be recovered by the government "from all property involved and from all defendants shall not exceed $156,686.68 plus interest and costs . . . ." Both appellants failed to prosecute their appeals from this judgment.

In September, 1959 appellee, hereinafter called the receiver, was prepared to sell the locus. Fauci thereupon sought an injunction against him in the district court, alleging in her petition that she was the owner of the locus and that she had tendered and was still tendering the amount owed by her under paragraph 7 of the judgment. Her position was that this tender satisfied her only obligation under the judgment, and that she was therefore entitled to assert her ownership interest in the locus and prevent the sale. The court entered an order denying the petition, and Fauci appeals.

In October, 1959 the receiver proceeded in the district court against Denehy, alleging that she was seeking in the Land Court of the Commonwealth of Massachusetts to foreclose a mortgage upon the locus; that he had been given notice of the proceedings, and that such action was in derogation of his rights under the judgment and cast a cloud upon the title to the property which he was seeking to sell pursuant thereto. The district court issued a temporary injunction, which it thereafter made permanent. In its final order it permanently enjoined Denehy from claiming title to or any other interest in the locus, and ordered her to execute and deliver to the receiver a discharge of the mortgage. Denehy appeals.

We deal first with the Fauci appeal. Fauci contends that the court cannot go behind the judgment, even to the extent of examining the complaint upon which it is based. Although this contention is erroneous, see, e.g., *Oklahoma* v. *Texas*, 1921, 256 U.S. 70, 87-88, we will assume for the sake of argument that appellant is entitled to rest her case on the judgment as it stands alone. It is true that the payment of the amount tendered would discharge Fauci's personal monetary obligation under paragraph 7. However, within the four corners of the judgment it is apparent that this was not the only matter determined. Paragraph 5, which is without any limitation here relevant, unambiguously provides that the government's lien against the locus "has priority over the claims of all parties to this action." This means all claims. Appellant was a party. She offers no explanation why any claim of hers is to be excluded, or why she is not bound by this portion of the judgment. On its face the government's lien is not limited by the amount stated in paragraph 7, but will exist until the government has recovered $156,686.68. Appellant makes no suggestion that her tender would accomplish that result. Her appeal is without merit.*

Denehy, unlike Fauci, bases her case on the proposition that the judgment must be interpreted in the light of the prior proceedings. Her contention is that the matter of her mortgage was not before the district court and was not passed upon because no allegations were made, and no evidence was introduced, specifically concerning it. However, Denehy herself was before the court, and the

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* Although appellee has not raised the issue, we note in passing that Fauci's appeal may well be moot since the record shows that the property was actually sold on October 17, 1959, after notice of appeal was filed, but before argument. Although appellant requested a stay of the sale in the district court, the request was denied, no appeal from that order was taken, and no stay was sought in this court.

complaint raised the general issue of whether, so far as creditors were concerned, ownership of the locus was to be regarded as in the taxpayers as distinguished from the other defendants. More specifically, paragraph 15 of the complaint in the original action named appellant as one of the defendants who had received property from the taxpayer, and the locus was listed, in subparagraph (c), as part of the property in question. Appellant's answer to this part of the complaint was that, "Defendant Denehy denies each and every allegation made by the plaintiff in Paragraph 15 of the Complaint insofar as it concerns her interest and property mentioned in Sub-Paragraphs a, b, c, d and g . . . . ," and alleged insufficient knowledge to answer as to the other property. It seems apparent that appellant thereby admitted that she had an interest in the locus and merely denied that it was subject to return to the taxpayers vis-à-vis the government's claim. Moreover, the statute under which the proceedings were brought, 26 U.S.C. §7403(c), Int. Rev. Code of 1954, required the court "to adjudicate all matters involved . . . and finally determine the merits of all claims to and liens upon the property . . . ." The judgment did not purport simply to set aside certain specific transfers, but was full and complete so far as the government's lien was concerned. If its terms were excessive and unwarranted, this was a matter to be raised before the court at that time, a course which Denehy failed to take. Having remained silent as to her alleged mortgage, and having permitted the suit to proceed to a broad and final decree determining rights in the locus, appellant cannot now attempt to retry those issues "in an independent suit based solely upon a title that [s]he was a liberty to set up, but chose not to assert, before the decree was rendered." *Dowell* v. *Applegate*, 1894, 152 U.S. 327, 343. Under these circumstances, Denehy's prosecution of the Land Court proceedings constituted a collateral attack upon the judgment, and was in derogation of the receiver's rights there-

under. The district court clearly had the requisite power, in the course of an ancillary proceeding, to protect its judgment and effectuate the receivership by in effect enjoining the further prosecution of the Land Court proceedings. See, e.g., *Wabash R.R.* v. *Adelbert College*, 1908, 208 U.S. 38, 54, *reh. den.*, 208 U.S. 609.

Denehy argues that even if the court could prevent her from interfering with the receiver's sale by enjoining her from claiming title to, or an interest in, the locus, it was without power to amend its judgment at that late date by ordering her to convey a discharge of the mortgage. The receiver's position is that the court was not amending its judgment, but, rather, was enforcing it. We believe that this portion of the order was unnecessary and excessive. The receiver had only possession of the locus, not the title thereto. Nor did the original judgment attempt to settle the question of where title to the property lay as between taxpayers and the other defendants. It merely provided that as between the government and other persons with an interest in the locus the government's lien had priority. To satisfy this lien the property was to be sold, but if there was an excess, that was to be disposed of by further order of the court. While the conveyances may have been fraudulent as to the government, they were not declared invalid as between the immediate parties. The government was entitled to have the mortgage set aside only to the extent necessary to satisfy its claim. The decree should not order the mortgage's discharge, but should merely reaffirm that it does not constitute a lien on the premises as against the government, or anyone claiming under or through the government, and that to this extent appellant is enjoined from setting up or claiming any rights thereunder.

In No. 5594, judgment will enter affirming the order of the District Court; in No. 5595, judgment will enter vacating the order of the District Court and remanding the case to that court for further proceedings not inconsistent with this opinion.

APPENDIX B

Proceedings in Court of Appeals 79

On the same day, February 24, 1960, the following judgment was entered in case No. 5594:

JUDGMENT

February 24, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ Roger A. Stinchfield
Clerk.

Approved:

/s/ Peter Woodbury, C.J.

APPENDIX C

Oral Order and Judgment of the United States District Court for the District of Massachusetts entered on September 24, 1959.

The Court. Is there anything further?

Mr. Mottola. That property at 139-141 is a very valuable property, and it will be really unfortunate, if your Honor please—I say that the United States Government, the Department of Justice, wrote this judgment and nobody else, and they are bound by it. And I say that is the only judgment they [5] have against Edna Fauci, and I don't know of any other judgment against Edna Fauci, if your Honor please. And that is why, your Honor I urge your Honor with profound respect to the Court, that I think a temporary restraining order should be entered in this case, because I am here to pay the money she owes to the United States Government, your Honor.

The Court. Well, that only disposes of one part of the judgment.

Mr. Mottola. That is right.

The Court. But that doesn't say that the action against the property must be dissolved.

Mr. Mottola. But she claims she is the owner and says, "You have a judgment against me for a certain amount, and I am willing to pay you." I say, your Honor, it is a very interesting question.

The Court: I see your point. You are grasping at a straw that won't sustain any weight. I am going to deny the petition.

Mr. Mottola. May I ask another question, your Honor, to stay the sale of the property until the petition is reviewed, and save my appeal, please.

The Court. I told you the last time you were here this was the last continuance.

Mr. Mottola. Well, I couldn't do any business, and it

is disgusting. Will you save my appeal, please, and stay the sale of the property, please?

The Court. No, I will not.

[6] Mr. Mottola. Then I appeal, your Honor.

(Extract from Reporter's Minutes of hearing September 24, 1959, R. 6-10).

APPENDIX D

Judgment of the United States District Court for the District of Massachusetts entered April 23, 1958 in United States of America, Plaintiff v. Charles F. Fauci Company et al., Defendants, Civil Action No. 55-556-S

Judgment

[Entered April 23, 1958]

Upon consideration of the pleadings, the evidence and the verdict returned by the jury on March 22, 1957, in favor of the plaintiff against defendants Charles M. Fauci, Frances Denehy, Edna M. Fauci, Irving Himmel, Virginia Himmel, Atlas Liquor Co., and Edwin W. Hadley and Nathan Loeb as Trustees of the Mystic Avenue Real Estate Trust,

IT IS ORDERED, ADJUDGED AND DECREED

(1) That plaintiff have judgment against C. M. Fauci Co., Inc. in the amount of $156,686.68 plus interest at 6% from June 23, 1949.

(2) That plaintiff have judgment against Charles M. Fauci as transferee of C. M. Fauci Co., Inc. in the amount of $156,686.68 plus interest at 6% from June 23, 1949.

(3) That Edwin F. Hannon, Jr. be appointed as receiver to sell the real property located at 127 Mystic Avenue, Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston.

(4) That the proceeds of the sale of the aforesaid property be deposited in the Registry of Court.

(5) That the claim and lien of the United States with respect to the property located at 127 Mystic Avenue,

Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston, has priority over the claims of all parties to this action.

(6) That the proceeds of the sale of the property described in paragraph 3 shall be first distributed, by order of Court, to plaintiff United States of America in satisfaction of its judgments against C. M. Fauci Co., Inc. and Charles M. Fauci, with any excess to be distributed as shall be provided by the Court.

(7) That plaintiff have judgment against Edna M. Fauci in the amount of $3,185.54 with interest at 6 per cent from May 11, 1953.

(8) That plaintiff have judgment against Atlas Liquor Company in the amount of $55,000.00, (the value of the assets of the C.M. Fauci Co. transferred to the Mystic Liquor Co. (subsequently known as Atlas Liquor Co.) on 12/28/48) with interest at 6 per cent from February 24, 1949.

(9) That plaintiff have judgment against Virginia Himmel in the amount of $54,000.00, (the value of all of the outstanding stock of the Atlas Liquor Co. on February 17, 1950), with interest at 6 per cent from February 17, 1950.

(10) That plaintiff have judgment against Irving Himmel in the amount of $7,547.24 with interest at 6 per cent from September 30, 1956.

(11) That costs in the amount of $..... be taxed against defendants, C. M. Fauci Co., Inc., Charles M. Fauci, Frances Denehy, Edna Fauci, Atlas Liquor Co., Irving Himmel, and Virginia Himmel.

(12) That the total amount to be recovered by the United States in this action from all property involved and from all defendants shall not exceed $156,686.68 plus interest and costs as provided by law.

(13) That any and all amounts paid by any and all defendants in satisfaction of the aforesaid judgments shall be paid into the Registry of the Court.

(14) That the order entered on May 23, 1956, ordering the trustees of the Mystic Avenue Real Estate Trust to pay $200. per month to Charles M. Fauci and Frances Denehy be vacated and that said trustees, Edwin W. Hadley and Nathan Loeb are ordered not to make any further payments out of trust assets or income to Charles M. Fauci or Frances Denehy.

s/GEO. C. SWEENEY
United States District Judge

Receivers bond to be in the amount of $10,000.00
s/GCS.

APPENDIX E

Statutes

Internal Revenue Code of 1939:

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax.—Except as provided in sections 272(a), 871 (a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) Liability of Transferee of Fiduciary.—No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect to any income, war-profits, excess-profits, or estate tax, (2) the amount of the liability, at law or in equity, of a transferee of property of a donor in respect of any gift tax, or (3) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C., Title 31 Sec. 192) in respect of any such tax.

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax.—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) Liability of Transferee or Fiduciary.—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

The Constitution of the United States of America

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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Office-Supreme Court, U.S.
FILED
MAY 6 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 840.

EDNA M. FAUCI, *Petitioner*,

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT AND EDWIN F. HANNON, JR., RECEIVER, *Respondents*.

RESPONDENT EDWIN F. HANNON'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Statute.

26 U.S.C. Sec. 7403	2, 5

Supreme Court of the United States.

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No. 840.

EDNA M. FAUCI, *Petitioner,*

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT AND EDWIN F. HANNON, JR., RECEIVER, *Respondents.*

RESPONDENT EDWIN F. HANNON'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioner seeks by her petition to upset the decision of the United States District Court for the District of Massachusetts, unreported, and the affirming decision of the Court of Appeals for the First Circuit, 275 F. 2d 234 (1960).

Question Presented.

Whether the petitioner is bound by a judgment of the United States District Court for the District of Massachusetts, entered on April 23, 1958, from which she failed to prosecute an appeal, resulting from an action in the nature of a bill to reach and apply brought by the United States against the petitioner and others, in which action

the petitioner was served with process, filed an answer, and was at all times represented by counsel.

Statute Involved.

26 U.S.C. Section 7403.

Statement of the Case.

This petition arises from an action by the United States to recover delinquent taxes. The case does not involve a conflict of decisions between different Courts of Appeals, nor new or doubtful questions of law, nor a conflict between the decision of the Court of Appeals and the applicable decisions of this Court or any other Court. The petition raises no matter of public interest or importance.

On June 22, 1955, the United States filed a complaint seeking to recover delinquent taxes of $156,686.88 assessed against taxpayers Charles M. Fauci Company, Inc., and Charles M. Fauci (R. 62-67). The complaint recited the assessment of deficiencies against the taxpayers, creating tax liens in favor of the United States on the taxpayers' property and rights to property (pars. 4, 8), the filing of notices of lien (pars. 6, 10), that the taxpayers had rights in certain real estate at 127, 129-131 and 139-141 Mystic Avenue, Medford, Massachusetts, and 41-43 Stanhope Street, Boston, Massachusetts (par. 15), that the United States was entitled to such properties in the right of the taxpayers (pars. 15, 16), and that during the period involved, while the taxpayers were insolvent, they conveyed property to various named defendants, among them Edna M. Fauci, without giving adequate consideration for the property (pars. 13, 14). It prayed for personal judg-

ments of $156,686.68 against the defendant taxpayers (prayers 1, 2), satisfaction by the other named defendants of the tax claims to the extent of transfers to them of the taxpayers' properties (prayer 5), and enforcement of the tax liens of the United States against the properties and rights to property of the defendant taxpayers (prayer 6). Petitioner Edna M. Fauci filed an answer[1] (R. 67-68), as did the other defendants. Following dismissal by the Court of Appeals of an appeal from an interlocutory order in the case (*United States* v. *Fauci*, 242 F. 2d 237 (1957)), a trial was had on the issue of liability, and a verdict was returned for the United States on March 12, 1957. On April 22, 1958, a trial before the District Court was had on the issue of damages. On April 23, 1958, judgment was entered, ordering, *inter alia*, that the real estate be sold and decreeing that the claim and lien of the United States to the real estate had priority over the claims of all the parties to the action (R. 2-4). The judgment was later amended, on October 1, 1958, and November 4, 1958, in cer-

---

[1] Edna M. Fauci's petition for injunction (R. 4-6) alleges, in paragraph 2, that Edna M. Fauci owns the 139-141 Mystic Avenue property. Yet Edna's answer to the allegations of the original complaint on this matter was as follows:

> "15. [Complaint.] That from time to time since May 14, 1942, the defendants Frances C. Denehy . . . have each taken or received property . . . from or on behalf of defendants Charles M. Fauci Company, Inc., or Charles M. Fauci; that Charles M. Fauci, Inc., and Charles M. Fauci are now entitled to the return of such property . . . or the proceeds therefrom . . . including the following:
>
> . . . . . .
>
> "(c) A parcel of improved realty known and numbered as 139-141 Mystic Avenue, Medford, Massachusetts."
>
> "7. [Answer of Charles M. Fauci and Edna M. Fauci.] As to the allegations contained in paragraph 15 of the Complaint, the defendants admit the allegations insofar as they are correctly stated."

tain respects not here material.[2] An appeal from the judgment of April 23, 1958, to this Court was taken by Edna M. Fauci. The appeal was dismissed for want of diligent prosecution on May 11, 1959 (R. 62).

The Receiver prepared to sell the properties pursuant to paragraphs 3 and 4 of the judgment. On June 26, 1959, Edna M. Fauci moved to postpone the sale from June 27, 1959, to September 26, 1959, and her motion was granted. On September 22, 1959, Edna M. Fauci filed a petition for injunction to enjoin the sale, alleging that she owned the property at 139-141 Mystic Avenue (par. 2), that she was prepared to pay $4411.97 in satisfaction of that part of the judgment of April 23, 1958, which gave the United States judgment against her of $3185.54 with interest (pars. 7, 8), and that she would suffer undue hardship if the property were sold (par. 6) (R. 4-6). The petition was heard on September 24, 1959, at which time oral arguments were made, $4411.97 was tendered, and the petition was denied (R. 6-10). Edna M. Fauci's notice of appeal, filed October 2, 1959, in the District Court, stated that she appealed from the orders of the Court refusing the injunction prayed for, refusing the tender made, and denying the petition (R. 10).

On February 24, 1960, the Court of Appeals affirmed the order of the District Court.

Argument.

Paragraph 5 of the judgment of the District Court stated:

> "That the claim and lien of the United States with respect to the property located at 127 Mystic Avenue,

---

[2] These were the only occasions when the judgment was amended.

Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston, has priority over the claims of all parties to this action." (R. 2.)

The District Court was required by 26 U.S.C. Sec. 7403(C) "to adjudicate all matters involved [in the action] . . . and finally determine the merits of all claims to and liens upon the property"; and it was empowered, to effectuate such adjudication, to "decree a sale of such property . . . and a distribution of the proceeds of such sale according to the findings of the Court . . ." The petitioner was represented by counsel who filed an answer in her behalf (R. 61, 67-71), and took an appeal from the judgment of the District Court. This appeal was dismissed for want of diligent prosecution on May 11, 1959. Her claim of title in the real estate in question as against the United States is res adjudicata. *Harshman* v. *Knox County*, 122 U.S. 306, 318 (1887). *Carpenter* v. *M. J. & M. & M., Consolidated*, 212 Fed. 868 (9th Cir. 1914). Both the assumption made by the petitioner in her brief that the real estate in question is hers and the question of federal tax law and constitutional law alleged to exist on the basis of the assumption of ownership cannot stand against the judgment of the District Court fixing paramount title in the United States.

Conclusion.

This case does not present any novel or substantial issues of law. The petitioner seeks to change the purport and meaning of the judgment of the United States District Court which was affirmed by the Court of Appeals, and it

is respectfully submitted that the petition fails to present a question calling for review by the Supreme Court of the United States.

Respectfully submitted,

ARTHUR L. BROWN,

THOMAS E. GOODE,

Attorneys for Respondent

EDWIN F. HANNON, JR.

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OFFICE-SUPREME COURT, U.S.
FILED
MAY 20 1960
JAMES R. BROWNING, Clerk

Nos. 840 and 841

In the Supreme Court of the United States

OCTOBER TERM, 1959

EDNA M. FAUCI, PETITIONER

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT, AND EDWIN F. HANNON, JR., RECEIVER

FRANCES C. DEMERLY, PETITIONER

v.

EDWIN F. HANNON, JR., RECEIVER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 840

EDNA M. FAUCI, PETITIONER

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT, AND EDWIN F. HANNON, JR., RECEIVER

No. 841

FRANCES C. DENEHY, PETITIONER

v.

EDWIN F. HANNON, JR., RECEIVER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The consolidated opinion of the Court of Appeals (No. 840, Pet. 10–15; No. 841, Pet. 9–14) is reported at 275 F. 2d 234. The District Court filed no written opinion.

JURISDICTION

The judgments of the Court of Appeals (No. 840, Pet. 16; No. 841, Pet. 15) were entered February

24, 1960. The petitions for writs of certiorari were filed on April 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the judgment of the District Court entered in a prior action brought by the United States to foreclose its liens for delinquent taxes, to which these petitioners were parties and which involved the parcel of real property here in issue, precludes the instant actions collaterally attacking that judgment.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7401. AUTHORIZATION.
>
> No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.
>
> (26 U.S.C. 7401.)
>
> SEC. 7402. JURISDICTION OF DISTRICT COURTS.
>
> (a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not ex-

clusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * *

(26 U.S.C. 7402.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings

of the court in respect to the interests of the parties and of the United States.

* * * * *

(26 U.S.C. 7403.)

DISCUSSION

On September 22, 1959, after a judgment of the District Court entered on April 23, 1958, in a suit in which petitioner in No. 840, Fauci, was a party defendant, had become final, petitioner filed a petition in the District Court (R. 4–6)[1] praying that the United States, the District Director of Internal Revenue of Boston, and the Receiver, be enjoined from selling certain real estate, the rights to which had been determined in the prior judgment. The District Court dismissed the petition. (R. 6–10.) The Court of Appeals affirmed. (Pet. 10–15.)

On August 21, 1959, petitioner in No. 841, Denehy (who had also been a defendant in the prior suit), brought an action in a state court (R. 10–12) alleging that she was the holder of a mortgage against certain real property, the rights to which had been determined in the prior judgment, and praying that an order be entered permitting her to foreclose. The Receiver filed a general appearance in the state court, and on October 6, 1959, filed his petition in the District Court (R. 6–9) for an order enjoining petitioner

[1] "R." citations herein are to the printed pages of the Record Appendix to the brief filed by the petitioners, respectively, with the Court of Appeals. "Supp. R." citations herein are to the printed pages of the Record Appendix to the consolidated brief filed in the Court of Appeals on behalf of the appellees in both appeals.

from prosecuting the state court action. The District Court permanently enjoined petitioner's prosecution of the state court suit. (R. 39–40.) The Court of Appeals affirmed the District Court, directing, however, that the portion of the order directing Denehy to convey a discharge of the mortgage be deleted as "unnecessary and excessive." (Pet. 9–14.)

The facts as to the prior suit are as follows: In 1955, an action was brought in the District Court of Massachusetts by the United States pursuant to Section 7401 *et seq.* of the Internal Revenue Code of 1954, *supra*, against C. M. Fauci Company, Inc., and several other defendants, including Edna M. Fauci and Frances C. Denehy, petitioners herein. (Supp. R. 18–23.) The complaint alleged that deficiencies had been assessed against the taxpayers, creating liens in favor of the United States on taxpayers' property and rights to property; that taxpayers were insolvent during the taxable years involved and subsequently; that the petitioners and other defendants had received certain property from taxpayers without giving adequate consideration therefor; that the taxpayers were entitled to the return of such property or other benefit, or the proceeds therefrom. (Supp. R. 19–22.)

The complaint further alleged that by virtue of its liens upon all property and rights to property of the taxpayers, the United States was entitled to such property or its proceeds in the hands of the petitioners and other defendants, and that the United States was further entitled to the benefits of all other rights and claims taxpayers may have against the defendants. (Supp. R. 22.) One of the properties

described in the complaint was the parcel of improved realty known as 139–141 Mystic Avenue, Medford, Massachusetts, which is the same property involved in each of the petitions here. (Supp. R. 21; No. 840, R. 9; No. 841, R. 4.)

Each of the petitioners answered, denying the above allegations of the complaint. (Supp. R. 24, par. 4; Supp. R. 26.) Following a jury verdict the District Court, on April 23, 1958, entered a money judgment against the taxpayers for the full amount claimed, and appointed Edwin F. Hannon, Jr., as receiver to sell certain real estate, including the property involved in the petitions here, and deposit the proceeds in court. In addition, the judgment provided in paragraph 5 that the claim and lien of the United States with respect to the property at 139–141 Mystic Avenue, Medford (the property involved here) and other properties "has priority over the claims of all parties to this action." And in paragraph 6 thereof that the proceeds of the sale of the property, including 139–141 Mystic Avenue, "shall be first distributed, by order of Court, to plaintiff United States of America in satisfaction of its judgments against C. M. Fauci Co., Inc. and Charles M. Fauci, with any excess to be distributed as shall be provided by the Court."[1] The District Court's judgment also provided that the total amount to be recovered by the Government "from all property involved and from all defendants" should not exceed

[1] No money judgment was entered against Denehy. A money judgment was entered against Edna M. Fauci for $8,186.54 with interest. (No. 840, R. 3.)

$156,686.68 plus interest and costs. (No. 840, R. 2–3.)

Appeals from the judgment were taken by various parties, including these petitioners, which were subsequently dismissed (without objection in the appeal of petitioner Denehy) by the Court of Appeals on motion of the United States for want of diligent prosecution. See the District Court's docket entries of May 11, 1959 and June 15, 1959. (Supp. R. 18.)

It is thus apparent that petitioners are attempting to raise issues which were fully adjudicated in a prior judgment of the District Court which has become final. In any event, no question warranting review by this Court is presented.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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MAY 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960